JD(SF)-07-03
Monterey, CA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

MONTEREY NEWSPAPERS, INC.,
a wholly owned subsidiary of
KNIGHT-RIDDER, INC., d/b/a
MONTEREY COUNTY HERALD

Cases 32-CA-17970-1
32-CA-18236-1
32-CA-18284-1
32-CA-18330-1
and 32-CA-18499-1
32-CA-18748-1
32-CA-18835-1
SAN JOSE NEWSPAPER GUILD 32-CA-19061-1
LOCAL 39098, chartered by 32-CA-19445-1
THE NEWSPAPER GUILD-CWA, 32-CA-19518-1
AFL-CIO, CLC

Valerie Hardy Mahoney, Atty., (Region 32) of Oakland, California, Counsel for the General Counsel
Andrew Kramer and Harry Johnson, Attys., respectively of Washington, D.C. and Los Angeles, California, Counsel for Respondent.
Eugene Miller, Atty., of Seaside, California, Counsel for Charging Party.

DECISION

Statement of the Case

LANA PARKE, Administrative Law Judge. This case was tried in Salinas, California on November 4 through 6, 2002. [1] Pursuant to charges filed by San Jose Newspaper Guild, Local 39098, chartered by The Newspaper Guild-CWA, AFL-CIO, CLC (the Union), the Regional Director of Region 32 of the National Labor Relations Board (the Board) issued a Fifth Order Consolidating Cases, Third Amended Consolidated Complaint and Notice of Hearing (the

[1] All dates are in 2002 unless otherwise indicated.

complaint) on May 31.[2] The complaint alleges that Monterey Newspapers, Inc., a wholly-owned subsidiary of Knight-Ridder, Inc., d/b/a Monterey County Herald (Respondent) violated Sections 8(a)(5) and (1) of the National Labor Relations Act (the Act).

ISSUES

1. Did Respondent violate Sections 8(a)(5) and (1) of the Act by failing and refusing to provide the Union with notice and opportunity to bargain prior to imposing discipline, including discharge, on employees in the bargaining unit?
2. Did Respondent violate Sections 8(a)(5) and (1) of the Act by transferring switchboard operator Vicki Van Hook (Ms. Hook) to the position of legal clerk without prior notice to the Union and without affording the Union an opportunity to bargain with Respondent over the transfer and the effects of the transfer?

On the entire record and after considering the briefs filed by the General Counsel, the Charging Party, and Respondent, I make the following

FINDINGS OF FACT

I. Jurisdiction

Respondent, a California corporation, is engaged in the publication of the Monterey County Herald, a newspaper of general circulation with an office and place of business in Monterey, California. In the course and conduct of its business operations, Respondent has subscribed to interstate news services, published nationally syndicated features, and advertised nationally sold products. During a representative 12-month period ending May 31, Respondent derived gross revenues of $200,000 and purchased and received goods or services valued in excess of $5,000, which originated outside the State of California. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.[3]

[2] At the commencement of the hearing, the parties represented that a settlement agreement obviated portions of the complaint. Counsel for the General Counsel withdrew Cases, 32-CA-18952-1 and 32-CA-19126-1 and portions of 32-CA-18236-1. This resulted in withdrawal of the following paragraphs of the complaint: 8 through 10, 13 through 22, 25, and those portions of paragraph 26 that correspond to the withdrawn paragraphs. During the hearing, Counsel for the General Counsel's motion to withdraw paragraph 23 and corresponding portions of paragraph 26 of the complaint was granted.

[3] Where not otherwise noted, the findings herein are based on the pleadings, the stipulations of counsel, and/or unchallenged credible evidence.

II. Alleged Unfair Labor Practices

A. Refusal to bargain before imposing discipline

Knight-Ridder, Inc. acquired Monterey Newspapers, Inc. (MNI), publisher of the *Monterey County Herald* from E.W. Scripps on August 24, 1997.[4] On August 28, 1997, as a successor employer, Respondent recognized the Union as the collective-bargaining representative of employees in the historical unit: All full-time and regular part-time employees employed by Respondent in its Advertising (including classified), Building Maintenance, Business Office, Circulation, and News Departments.[5] Since September 10, 1997, Respondent and the Union have been engaged in negotiations for an initial contract.

Upon acquisition of MNI in August 1997, Respondent lawfully established initial terms and conditions of employment including those recorded in its Employee Handbook. The section entitled "Standards of Conduct" contains the following relevant provisions:

> A. ATTENDANCE
> …If you are absent three consecutive workdays without authorization or notice to the Company, at the end of the third day the Company will assume that you have voluntarily quit your job.
> ….
> Excessive absences and failures to report absences on time will lead to discipline up to and including discharge.
>
> ….
>
> B. TARDINESS
> You must arrive at your job location and be ready to start work at the beginning of your assigned shift. Be ready to resume work on time after authorized rest and meal periods. Tardiness may lead to discipline up to and including discharge.
>
> ….
>
> C. Discipline
> Unsatisfactory performance may lead to disciplinary action, up to and including termination. The nature of the discipline imposed will depend upon the seriousness of the problem and your record of prior performance, behavior problems, or safety violations. The Company has the right to determine what disciplinary action is appropriate based on the facts of each case. Not all available forms of discipline are appropriate to every disciplinary situation, and it is not required that the Company treat each form of discipline as a step in a series to be followed with an employee before discharge. The Company's practice of employee discipline does not imply that progressive discipline is required or that employment may be terminated only for cause.
>
> ….
>
> D. PROHIBITED CONDUCT
> The following conduct is prohibited and will not be tolerated by the Company. Violation of any of the following rules will lead to disciplinary action, up to and including termination of employment, depending on the nature of the offense, and the employee's record of prior performance, behavior problems, and safety violations. This list of

[4] The bargaining history of Respondent and the Union is more fully set out in *Monterey Newspapers, Inc.,* 334 NLRB No. 128, at slip op. 1 (2001).

[5] I granted Respondent's post-hearing motion to amend its answer to admit the appropriateness of the unit and that the Union has been the Section 9(a) collective bargaining representative of unit employees since August 24, 1997.

> prohibited conduct is illustrative only; other types of conduct injurious to security, personal safety, employee welfare and the company's operations may also be prohibited.

The handbook then lists 32 specific acts or conduct that will lead to disciplinary action, including falsifying employment information or time cards, theft, fighting, carrying firearms, creating a disruption at work, insubordination, sleeping on the job, and violation of any company policy. The list concludes with the following catchall embargo: "Any other conduct that is unprofessional, potentially embarrassing, or otherwise detrimental to the interests of the Company or its other employees."

The handbook section entitled “Termination policies” contains the following relevant provision:

> B. DISCHARGES
> As discussed elsewhere in this handbook, the Company subscribes to the policy of “employment at will.” This means that either the Company or the employee can terminate the employment relationship at any time, for any legal reason, with or without cause, and with or without notice.
>
> Employment with the Company may be involuntarily terminated through one of the following actions:
>
> - Reduction in force or job elimination;
> - Reorganization of the Company;
> - Involuntary discharge, with or without cause, and with or without notice;
> - Failure to return to work on a timely basis following a leave of absence;
> - Failure to report to work without notice to the Company for three (3) consecutive workdays;
> - Prolonged disability of the employee resulting in an inability of the employee to perform safely all of the essential functions of the job, with or without reasonable accommodation; or
> - Death of the employee.

The handbook disavows any system of progressive discipline and provides no more specific guidelines for imposition of discipline than set forth above. As Danielle Ross (Ms. Ross), Respondent's Human Resources Director, testified, "We exercise discretion in the type of discipline going on." Respondent also stipulated that individual supervisors use individual discretion, case by case, in determining whether or to what degree to impose discipline.

At all relevant times, the Union has requested pre-imposition notification and bargaining opportunity for all discipline. By letter dated July 18, 1999, from Darren Carroll (Mr. Carroll), International Representative of the Union, the Union informed Respondent, inter alia:

> The obligation of the company to bargain over proposed changes in wages, hours, and other terms and conditions of employment extends, in the Guild’s view, to any proposed discipline. The Guild stated on July 15, as it has done repeatedly in discussions with the Herald, that the company has an obligation to give advance notice to the Guild of any proposed discipline and an opportunity to bargain over that discipline.

As an example of the Union's continuing position, the following letter, dated July 13, 2000, reiterates the Union's demand for pre-imposition notification of and bargaining over all discipline:

> The Guild consistently has contended that The Herald must provide advance notice and an opportunity to bargain over any proposed changes in terms and conditions of employment, and that such proposed changes cannot be implemented until negotiations have been lawfully terminated. This extends to proposed discipline as well as to new performance standards that are used as the basis for discipline.

As described in paragraph 11 of the complaint, Respondent administered various forms of discipline or employment action, including discharge, as set forth in the following Table of Discipline/Employer Action, during the period October 14, 1999 through March 13:

TABLE OF DISCIPLINE/EMPLOYER ACTION

Discipline/Employer Action Employee Name	Date mm/yy	Reason for Discipline/Action
Written Warnings		
Joe Graziano	10/99	Unsatisfactory performance: editing
Joe Graziano	12/99	Unsatisfactory performance: editing
Terri Neece	01/00	Unsatisfactory performance: corporate donations NIE program
Joy Cook	06/00	Unsatisfactory performance sales call quota and paperwork
Andrew McFarland	08/00	Abusive language to contractor
Octavius Thompson	08/00	Tardiness/attendance
Jeffrey Samuels	03/01	Abusive language to contractor
David Lopez	07/01	Alcohol use while on duty
Gerald Fudge	07/01	Fraudulent act/breach of trust: leave request
Shannon Reed	07/01	Insubordination, abusive language, disrupting business
Dean Chyo	08/01	Unprofessional conduct: customer complaints
Angela Johnson	11/01	Attendance: unauthorized failure to report to work
Vicki Van Hook	01/02	Unsatisfactory performance: classified department
Raymond Garbin	01/02	Unsatisfactory performance: accounting department
Sabrina Blacks	03/02	Tardiness/attendance
Suspension		
Amado Gonzalez	06/00	Threats to co-worker
Three Consecutive Unauthorized Absence Terminations		
Eric Geshan-Ramirez	06/00	Failure to report for work four consecutive days
Amanda Cosmero	07/00	Failure to report for work three consecutive days
Tanisha Lewis	07/00	Failure to report for work five consecutive days
Hugo Ceja	07/00	Failure to report for work more than three consecutive days
Seneca Whaley	12/00	Failure to report for work four consecutive days
Mark Johnson	09/01	Failure to report for work more than three consecutive days
Other Terminations		
Joe Graziano	01/00	Continued unsatisfactory performance
Terri Neece	01/00	Continued unsatisfactory performance
Donald Nahinu	06/00	Unsatisfactory performance
Amado Gonzales	06/00	Threats to co-worker, uncooperative/belligerent behavior
Melissa Remick	07/00	In conjunction with denial of request for indefinite period of leave
Brent Gayman	08/00	Following work injury, inability to offer alternate assignment within physical restrictions
Ray Richardson	03/01	Unsatisfactory performance
Jeffrey Samuels	04/01	Refusal to meet with supervisors to discuss written warning and failure to work assigned scheduled
Veronica Melgoza	07/01	Falsification of service and commissionable transactions
Dean Chyo	09/01	Continued unsatisfactory performance
Laurie Peck	01/02	Continued unsatisfactory performance
Vicki Van Hook	01/02	Advertising accounting falsification
Sabrina Blacks	01/02	Time card falsification
Raymond Garbin	03/02	Continued unsatisfactory performance

Of these actions, Respondent asserts that employees Eric Geshen-Ramirez, Amanda Cosmero, Tanisha Lewis, Hugo Ceja, Seneca Whaley, and Mark Johnson were voluntary quits pursuant to the attendance policy set forth in the Employee Handbook, in that each had three consecutive unauthorized absences. Regardless of how Respondent categorizes their terminations, it is clear that these employees were disciplined for their absences. Therefore, I include them in all references to disciplined employees. With regard to Brent Gayman (Mr. Gayman), his termination was not a disciplinary action as explained more fully below. I do not, therefore, include Mr. Gayman in references to disciplined employees.

Counsel for Respondent agreed that supervisory discretion was exercised with respect to all of the discipline described in paragraph 11 of the complaint. Even as to employees falling within the "voluntary quit" provisions, Respondent does not uniformly apply the handbook specifications and may extend the unauthorized absence limit at its discretion.

Respondent gave no notification to the Union prior to imposing any discipline. At all times relevant to the complaint, Respondent took the position that it had no duty to notify or to bargain with the Union before imposing discipline. As example of Respondent's continuing refusal to bargain in advance of imposing discipline, in response to Mr. Carroll's July 13, 2000 letter, by letter dated July 24, 2000, Respondent replied:

> …With respect to your continued position that The Herald must provide advance notice of any changes in terms and conditions of employment, please be advised that the disciplinary standards that have been in place at The Herald have not changed since the date we took over and lawfully announced the initial terms and conditions of employment…our position remains the same, which is that there is no case law or standard that precludes The Herald from disciplining employees when their performance fails to meet our standards.

Respondent notified the Union of terminations after the fact and never refused to bargain over discipline once it was imposed.[6]

B. Transfer of Vicki Van Hook

The complaint alleges that on October 8, 2001, Respondent transferred switchboard operator Vicki Van Hook (Ms. Van Hook) to the position of classified department legal clerk without first notifying the Union or providing it an opportunity to bargain over the transfer and its effects in violation of Sections 8(a)(5) and (1) of the Act. Respondent has an internal application procedure whereby it posts job openings and accepts applications from current employees. Pursuant to that procedure, in late 1999 or early 2000, Respondent transferred Ms. Van Hook to a reception position. In October 2001, Respondent accommodated Ms. Van Hook's requested transfer to a legal clerk position. Prior to the latter transfer, Respondent did not notify the Union of its intention to transfer Ms. Van Hook.

[6] Counsel for the General Counsel and counsel for the Charging Party sought to adduce evidence of what bargaining strategies the Union would have utilized and what success it might have achieved had it been permitted to bargain with Respondent over discipline before implementation. I declined to receive the proffered evidence as I find it speculative and irrelevant to the issue of whether a bargaining obligation exists. However, I accept as axiomatic the proposition that the Union would likely be more effective in obtaining concessions for disciplined employees if bargaining were required pre-imposition of discipline than it would be in post-imposition bargaining.

Only a few months after her transfer to the legal clerk position, Ms. Van Hook was warned about unsatisfactory performance. Respondent then terminated her on January 23, 2002 because she failed timely to place a legal advertisement for a customer, charged half price because of the error, making up the difference in cost herself, and inaccurately reported the transaction. Respondent termed her conduct a violation of the "fraudulent act or breach of trust" prohibition of the employee handbook.

In the past, Respondent has notified and bargained with the Union over the transfer of certain employees, e.g., Tanya Mayer whom Respondent wished to transfer from a telemarketing to an outside sales position and Virginia Viller-Bennett, whose advertising classification Respondent wanted to change. Since Respondent acquired MNI, it has transferred at least twelve employees using the internal application procedure without prior notification to or bargaining with the Union.

C. Termination of Brent Gayman

Respondent did not terminate Mr. Gayman as a disciplinary action. Mr. Gayman was injured on the job. In the course of workers compensation proceedings, Mr. Gayman reached a permanent and stationary status with medical work restrictions. Respondent terminated Mr. Gayman after determining it could not reasonably accommodate his restrictions. Respondent did not notify the Union that it was considering Mr. Gayman's restrictions and accommodations thereto, including placement in alternative jobs, or that it proposed to terminate him. Respondent did not afford the Union the opportunity to bargain over its actions concerning Mr. Gayman.

D. Positions of the parties

All parties agree that Respondent, as a successor employer under *NLRB v. Burns Int'l Security Services*[7], lawfully established initial terms and conditions of employment, including those set out in the Employee Handbook. The General Counsel and the Charging party contend that implementation of terms and conditions of employment, including disciplinary action, that requires the exercise of discretion obligates an employer to give advance notice and opportunity to bargain to its employees' representative. The pre-discipline bargaining duty attaches, argues the General Counsel, even where the employer is exercising the same discretion set or utilized prior to the devolvement of any bargaining obligation.

Respondent argues (1) that an employer is not required to bargain, pre-imposition, over employee discipline that is exercised pursuant to lawfully established rules, and (2) that a *Burns* successor employer has a broader right than an incumbent employer to impose discipline if the disciplinary rules were encompassed in the successor's lawfully implemented terms and conditions. Respondent asserts that *Monterey Newspapers, Inc.*[8], which applies to an employer's setting wages under a new hire pay system, has direct application to the instant case, and permits a *Burns* successor to "set initial terms and conditions…[which may] include flexibility, i.e. discretion within bounds."[9] Under that authority, contends Respondent, it lawfully set initial terms and conditions of employment and exercised appropriate discretion concerning mandatory bargaining subjects, including discipline.

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[7] *NLRB v. Burns International Security Services,* 406 U.S. 272 (1972).

[8] 334 NLRB No. 128 (2001).

[9] Id. 334 NLRB No. 128, at fn. 11 (2001).

E. Discussion

1. Refusal to bargain before imposing discipline

No dispute exists as to the material facts herein: Respondent lawfully established written standards of employee conduct, and Respondent exercises broad discretion as to whether and what discipline it imposes for violation of those standards. The Union effected a standing request to bargain prior to the imposition of any and all discipline imposed on unit employees. While Respondent was willing to bargain with the Union post-employee discipline, Respondent declined to give pre-imposition notice or opportunity to bargain.

Disciplinary policies and procedures and any alteration thereto are unquestionably mandatory subjects of bargaining.[10] Further, it is unlawful for an employer to refuse to bargain, after-the-fact, with respect to the termination or reinstatement of employees.[11] Respondent has not refused to bargain about the topic of employee discipline; Respondent has not altered its initial disciplinary terms and conditions of employment, and Respondent has not refused to bargain over any discipline post-implementation. The narrow issue presented here is whether, in light of Respondent's discretion to determine what and when discipline will be applied to conduct that contravenes its written standards, Respondent is obligated to give notice and bargaining opportunity to the Union before imposing any form of discipline. Cases that bear, directly or analogously, on this issue do not provide conclusive direction.

The Board, in many cases, has focused on the breadth of employer discretion in determining whether an employer has taken unlawful unilateral action. In *Oneita Knitting Mills,* 205 NLRB 500 fn. 1 (1973), the Board found a unilateral grant of merit increases violated 8(a)(5), saying the Act required "a maintenance of preexisting practices, i.e., the general outline of the program, however the implementation of that program (to the extent that discretion has existed in determining the amounts or timing of the increases), becomes a matter as to which the bargaining agent is entitled to be consulted." Similarly, in *Garrett Flexible Products, Inc.,* 276 NLRB 704, fn 1 (1985), where the employer did not have an established practice regarding payment of insurance premium increases but exercised substantial discretion in allocating the increases to employees, the employer "…was obligated to notify and bargain with the union before passing on the entire premium increase to the employees…." The Board has noted that unlimited employer discretion over employment terms may restrain the union from performing its statutory bargaining role. Citing *Oneita Knitting Mills,* the Board found unlawful the post-bargaining impasse implementation of a merit raise program in *Colorado-Ute Electric Assn.,* 295 NLRB 607, 608 (1989). The program failed to detail how merit raises would be determined or granted beyond stating as criteria "individual performance" and "[job] contribution" and failed to fix merit award times and amounts. Moreover, the Board noted, "The proposal also exempted management's decision on these matters from union or employee challenge through the contractual grievance procedure." The Board concluded that since the program involved virtually unlimited employer discretion over merit increases and since the employer proposed

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[10] *Pepsi-Cola Bottling Company,* 330 NLRB No. 134 (2000); *Praxair, Inc.,* 317 NLRB 435 (1995); *Frontier Hotel & Casino,* 309 NLRB 761, 766 (1992) enfd. 71 F. 3d 1434 (9th Cir. 1995); *Ryder Distribution Resources,* 302 NLRB 76 (1991); *Manchester Health Center, Inc. d/b/a Crestfield Convalescent Home,* 287 NLRB 328 (1987); *Van Dorn Plastic Machinery Co.*, 265 NLRB 864 (1982).

[11] *Parker Transport, Inc.*, 332 NLRB No. 54 (2000), citing *Fibreboard Paper Products v. NLRB,* 379 U.S. 203, 209-210 (1964); *Ryder Distribution Resources,* 302 NLRB 76 (1991).

"…to exclude the Union from this exercise of discretion over employees' wages, [the Employer] was seeking the Union's waiver of its statutory rights under Section 8(a)(5) of the Act." Where employer discretion is too broad, following past practice will not shield an employer's unilateral conduct from the bargaining obligation. In *Adair Standish Corp.,* 292 NLRB 890, fn 1 (1989),[12] where there was no established method for determining when layoffs would occur or which employees would be selected, the Board held that notwithstanding a past practice of instituting economic layoffs, upon advent of the union, the employer "could no longer continue unilaterally to exercise its discretion with respect to layoffs…[but] was obligated to bargain with the Union…." Similarly, in *Eugene Iovine, Inc.,* 328 NLRB 294 (1999),[13] the Board held that a decision to reduce employee hours involved management discretion and required the employer to bargain with the newly certified union. The Board specifically noted that the employer in *Iovine* "failed to establish a past practice and further failed to establish that its … reduction of hours was consistent with its conduct in prior years."

In *Washoe Medical Center, Inc.,* 337 NLRB No. 32 (2001)--as in the present case--unilateral imposition of discipline was at issue. The Board affirmed the judge's dismissal of the unilateral discipline allegation because the evidence did not show the union had requested pre-imposition bargaining and stated, "In light of the Board's holding in *Oneita*…, we reject the judge's comment… that '[I]t is not sufficient that the General Counsel show only some exercise of discretion…the General Counsel must also demonstrate that imposition of discipline constituted a change in Respondent's policies and procedures.'" Id at fn 1. The Charging party argues that *Washoe Medical Center* makes clear that "…had the union demanded bargaining prior to the discipline being imposed the employer would have been obligated to notify the union prior thereto and afford the union an opportunity to bargain over the proposed discipline." I cannot agree that the Board's intention is so clear-cut, particularly in light of the Board's later decision regarding the same issue.

Following *Washoe,* the Board issued *McClatchy Newspapers, Inc. d/b/a The Fresno Bee,* 337 NLRB No. 180 (2002), in which unilateral imposition of discipline was again at issue.[14] In *The Fresno Bee*, as here, although written disciplinary policies existed, the employer exercised managerial discretion as to whether, when, and to what degree it imposed individual discipline. The judge concluded that as there was no evidence the employer failed to follow its established disciplinary rules, the employer had not effected unilateral changes in imposing discipline, and had not violated section 8(a)(5) of the Act. As to that issue, the Board affirmed the judge without comment. Counsel for the General Counsel distinguishes *The Fresno Bee* from the instant matter because the judge assertedly found there had been no formal request for bargaining and "only addressed the employer's obligations to bargain after discipline was imposed." Counsel for the General Counsel is incorrect. The judge's decision in *The Fresno Bee* clearly refers to a letter dated February 22,1999 as a request to bargain over any changes, including warnings, counseling, discipline or termination (see Findings of Fact, II k, at sl. op 16.) The judge fully discussed the issue of whether the employer was obligated to notify and bargain with the union before implementing any form of employee discipline. It is obvious that the judge's statement that the union made no formal demand to bargain is in the context of a discussion regarding post-discipline bargaining only, and the judge concluded that the union's conduct as to post-imposition discipline constituted a request to bargain. Thus, the same issue concerning pre-discipline implementation bargaining that exists here was fully considered in *The Fresno Bee.* Counsel for the General Counsel also argues that the degree of discretion

[12] Enfd. in relevant part 912 F.2d 854 (6th Cir. 1990)

[13] Enfd. 242 F. 3d 366 (2d Cir. 2001).

[14] I served as the Administrative Law Judge in both the *Washoe* and *The Fresno Bee* cases.

Respondent exercises herein compared to that exercised in *The Fresno Bee* differs in that Respondent "maintains virtually unfettered discretion in making disciplinary decisions." It is true that *The Fresno Bee* employer maintained a progressive disciplinary system that does not exist here, and, arguably, the progressive steps limited disciplinary discretion to some degree. To that extent, Respondent exercises greater discretion than that exercised in *The Fresno Bee*.

Notwithstanding the considerable disciplinary discretion possessed by Respondent, I cannot find authoritative support for the General Counsel's proposition that Respondent must, consequent to its discretion, notify and bargain with the Union prior to instituting any and all discipline. In ruling on a motion for summary judgment in *Quality Color Graphics,* 330 NLRB No. 195 (2000), the Board found the employer unlawfully discharged an employee in violation of 8(a)(5) of the Act when it failed to notify the union pre-discharge and give the union a reasonable opportunity to confer about the discharge. The Board based its finding on the employer's violation of a specific contractual provision requiring such advance notice and opportunity to confer. The Board did not suggest that any 8(a)(5) violation existed independent of the contractual obligation. In *Trading Port,* 224 NLRB 980 (1976), the Board concluded that the respondent did not violate Section 8(a)(5) by unilaterally installing a timing device to measure employee productivity more accurately and by its related tightening of existing disciplinary sanctions. The Board stated,, "…management activity in this area, when exercised on the basis of purely discretionary considerations, failing to conflict with plant practices openly evident from published standards…and which imposes no new form of discipline…is perfectly legitimate as peculiar to the general supervisorial function." *Id* at 983. The Board has never repudiated *Trading Port*. In *Watsonville Register-Pajaronian,* 327 NLRB 957, 963 (1999), the Board distinguished an offending employer's unilateral work rule change from conduct found lawful in *Trading Port,* supra, stating:

> Unlike the Respondent's actions here, the employer's actions in Trading Port, 'did not entail the publication of new rules or revisions to published standards.' Thus, it was concluded that the employer was privileged to act unilaterally to 'revis[e] its own internal procedures for assuring that employees do their work energetically or face the consequences,' if there was no conflict with plant practices evidenced from published standards, rules, or collective-bargaining agreements.

The Board based its judgment that the employer in *Watsonville* had violated Section 8(a)(5) of the Act on its finding that the company had "unilaterally imposed a new rule that changed the actual terms and conditions of employment." *Id* at 964. That is not the case here. Respondent has modified no work policies, has altered no job requirement or employment rule set out in the Employee Handbook, and has changed no past practice.

There is nothing in the above cases to suggest that the Board intended to encumber an employer's day-to-day operations by subjecting the managerial minutiae of individual discipline to pre-imposition union scrutiny. Indeed, in dicta, the Board rejects such an idea, stating in a case involving a failure to furnish the union with information of written and oral work rules, "We reiterate that we do not require the Respondent to advise the Union when it will discipline employees for the violation of such verbal work rules; we simply require the Respondent to inform the Union of the rules themselves." *Praxair,* supra, at fn 3. Moreover, Respondent has not sought, as the employer did in *Colorado-Ute Electric Assn.,* supra, to prevent the Union from exercising its statutory rights. Respondent has never attempted to curb the Union's power to bargain over imposed discipline and has consistently accepted its post-implementation obligation to confer with the Union, upon request, concerning the discharges, discipline, or reinstatement of its employees. See *Parker Transport, Inc.*, 332 NLRB No. 54 (2000), citing *Fibreboard Paper Products v. NLRB,* 379 U.S. 203, 209-210 (1964); *Ryder Distribution*

Resources, 302 NLRB 76 (1991). In these circumstances, I conclude that Respondent did not exceed discretional bounds in imposing employee discipline so as to require pre-imposition notification to and bargaining with the Union.

Further, I find persuasive Respondent's argument that *Monterey Newspapers, Inc.,* supra, expands its discretional leeway as a successor employer where it has set initial terms and conditions of employment. In that case, the Board stated:

> [W]here a union becomes the representative of a unit of employees, the employer must bargain about all terms and conditions of employment. However in a successorship situation (where the union continues to be the representative), the Supreme Court expressly gave the new employer a unilateral right to set initial terms and conditions, even if they differed from those prevailing under the predecessor. There is nothing in *Burns* to suggest that such initial terms cannot include flexibility, i.e., discretion within bounds.

While I have already concluded that, successor or not, Respondent did not overstep discretional bounds in imposing discipline without first notifying and permitting bargaining opportunity to the Union, that conclusion is even more compelling when Respondent's successorship status is considered. It is clear that the Board intends successor employers to enjoy greater discretion in effecting established initial terms and condition of employment than incumbent employers. Accordingly, I conclude that Respondent did not violate Section 8(a)(5) of the Act by imposing discipline on employees as set forth in the Table of Discipline/Employer Action above.

2. Transfer of Vicki Van Hook

There is no dispute that Ms. Van Hook's transfer to the legal clerk position was voluntary. Although the Employee Handbook is silent on the subject of employee job transfer, the uncontroverted evidence shows Respondent to have had a procedure of posting job openings internally and permitting employees to request reassignment to the posted positions. There is no evidence that Respondent did not follow its established procedure of making voluntary transfers without notification to or bargaining with the Union when it transferred Ms. Van Hook. Counsel for the General Counsel states that she:

> does not contend that Respondent unilaterally altered its established practice for posting jobs or filling vacant positions. Rather [argues Counsel for the General Counsel] Respondent violated the Act…by failing to advise the Union, in advance, as it had in the past with other employees it wished to transfer, that it intended to transfer Van Hook and by failing to give the Union an opportunity for meaningful bargaining."

While Respondent appears to have noticed and bargained with the Union over transfers Respondent initiated, the evidence does not show that Respondent historically gave notice to the Union of voluntary transfers. In these circumstances, Respondent did not change any past practice in accepting Ms. Van Hook's voluntary transfer request and did not unilaterally alter any term or condition of employment. Those facts do not change because the transfer proved insalubrious to Ms. Van Hook's employment. Accordingly, I conclude that Respondent did not violate Section 8(a)(5) of the Act by transferring Ms. Van Hook to the legal clerk position.

3. Termination of Brent Gayman

Respondent has a duty to bargain with the Union over whether or not workplace accommodations will be made to employees with work restrictions. See *Roseburg Forest Products, Co.,* 331 NLRB 999 (2000). While Respondent has certain responsibilities under the Americans with Disabilities Act (ADA),[15] there is no evidence that such would conflict with notification to and bargaining with the Union over possible accommodations for Mr. Gayman. Respondent's Employee Handbook caution that "prolonged disability of the employee…" may result in involuntary termination does not constitute a rule or policy as to disability accommodation. Even when Respondent's "unique status" as a successor employer is considered,[16] there is no evidence that Respondent set terms and conditions under which workplace accommodations are reviewed. This is not, therefore, a situation in which Respondent has "exercised discretion within bounds."[17] Rather, Respondent has set no bounds and so must accord the Union its statutory bargaining rights. Accordingly, Respondent violated Section 8(a)(5) by failing to notify and bargain, upon request, with the Union concerning its planned nonaccommodation and termination of Mr. Gayman.

Conclusions of Law

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. San Jose Newspaper Guild, Local 39098, chartered by The Newspaper Guild-CWA, AFL-CIO, CLC (the Union) is a labor organization within the meaning of Section 2(5) of the Act, and the exclusive representative of Respondent's employees in the following appropriate unit under Section 9(a) of the Act:

   All full-time and regular part-time employees employed by Respondent in its Advertising (including classified), Building Maintenance, Business Office, Circulation, and News Departments.
3. By failing to notify the Union, and provide it with an opportunity to bargain concerning accommodation of the work restrictions of Brent Gayman and his planned termination, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Sections 8(a)(5) and (1) and Section 2(6) and (7) of the Act.
4. Respondent did not otherwise violate the Act.

Remedy

The General Counsel and the Charging Party do not agree on the appropriate remedy in this case. The General Counsel seeks an order requiring Respondent to fulfill its bargaining obligation with respect to any employee who was the subject of unlawful unilateral action and an order requiring Respondent to bargain in advance of taking unilateral action on bargaining unit employees. The Charging Party contends that if Respondent is found to have violated Section 8(a)(5), the appropriate remedy must include restoration of the status quo as to affected employees, including reinstatement and full back pay for discharged employees. In the Charging Party's view, compliance may appropriately address issues arising from the following provision of Section 10(c) of the Act:

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[15] 42 U.S.C. § 12101, et seq.

[16] *Monterey Newspapers, Inc*., supra, at fn. 11.

[17] Ibid.

No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause.

In analogous situations, the Board has held that for a make whole remedy, there must be a "nexus between the unfair labor practice and the failure of [an] individual to be employed by the Respondent…a make-whole order must remedy actual and not speculative damages." *Page Litho, Inc.,* 313 NLRB 960, 964 (1994). While 10(c) of the Act does not apply to Mr. Gayman's termination as he was not discharged for cause, there is also no basis for finding actual damages to him. Mr. Gayman's termination did not stem directly from Respondent's unfair labor practice, but from his injury sequelae and from Respondent's failure or perhaps inability to accommodate his restrictions. It is inaccurate to say that Mr. Gayman's termination resulted solely from Respondent's unlawful conduct and it is speculative to say that pre-termination bargaining would have ensured Mr. Gayman's continued employment. See *Taracorp Industries,* 273 NLRB 221, 223 and fn. 10 (1984). Accordingly, a cease and desist order and an order requiring Respondent to bargain in advance of taking unilateral action on bargaining unit employees is appropriate here.

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[18]

ORDER

The Respondent, Monterey Newspapers, Inc., a wholly-owned subsidiary of Knight-Ridder, Inc., d/b/a Monterey County Herald, Monterey, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from
   (a) Failing and refusing to provide San Jose Newspaper Guild, Local 39098, chartered by The Newspaper Guild-CWA, AFL-CIO, CLC, (the Union) with prior notice and an opportunity to bargain concerning accommodations for work restrictions of injured employees in the following appropriate unit:

       All full-time and regular part-time employees employed by Respondent in its Advertising (including classified), Building Maintenance, Business Office, Circulation, and News Departments.

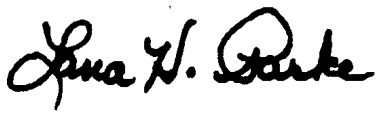
   (b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

[18] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

2. Take the following affirmative action necessary to effectuate the policies of the Act
   (a) If the Union requests, meet and bargain with it concerning accommodations for the work restrictions of Brent Gayman and his termination.
   (b) Within 14 days after service by the Region, post at its facility in Monterey, California copies of the attached notice marked "Appendix."[19] Copies of the notice, on forms provided by the Regional Director for Region 32, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 2000.
   (c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, at San Francisco, CA: February 3, 2003



Lana H. Parke
Administrative Law Judge

[19] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT Fail and refuse to provide San Jose Newspaper Guild, Local 39098, chartered by The Newspaper Guild-CWA, AFL-CIO, CLC, (the Union) with prior notice and an opportunity to bargain concerning accommodations for work restrictions of injured employees in the following appropriate unit:

All full-time and regular part-time employees employed by Respondent in its Advertising (including classified), Building Maintenance, Business Office, Circulation, and News Departments.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights set forth above.

WE WILL, upon request, meet and bargain with the Union concerning accommodations for the work restrictions of Brent Gayman.

WE WILL, upon request, meet and bargain with the Union concerning the termination of Brent Gayman.

Monterey Newspapers, Inc., a wholly-owned subsidiary of
Knight-Ridder, Inc., d/b/a Monterey County Herald
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

1301 Clay Street, Federal Building, Room 300N, Oakland, CA 94612-5211

(510) 637-3300, Hours: 8:30 a.m. to 5 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (510) 637-3270.